NO. 48814-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

STATE OF WASHINGTON
v.
EMANUEL MOORE

ON APPEAL FROM
THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON

The Honorable James Orlando, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, continued

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

RULES, STATUTES, AND OTHERS, continued

A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Mr. Moore promoted prostitution in the second degree.

2. Mr. Moore was prejudiced by the trial court admitting text messages from three different cell phones without adequate authentication or identification as required under ER 901(a).

3. Trial counsel's failure to object to the text messages was deficient performance and denied Mr. Moore his constitutional right to effective assistance of counsel.

4. Trial counsel's failure to object to the court giving a jury instruction regarding the need for the jury to agree on the acts involved after the jury had begun deliberating was deficient performance and denied Mr. Moore his constitutional right to effective assistance of counsel.

Issues Presented on Appeal

1. Did the state fail to prove Mr. Moore promoted prostitution where the state relied almost exclusively on text messages from three different cell phones without evidence that Mr. Moore actually sent or received any of the text messages?

2. Did the trial court abuse its discretion and prejudice

Mr. Moore by admitting text messages without a proper foundation?

3. Was Mr. Moore denied effective representation to his prejudice by counsel's failure to move to suppress text messages that were not properly authenticated?

4. Was Mr. Moore denied effective representation to his prejudice by counsel's failure to object to the court giving a jury instruction regarding the need for the jury to agree on the acts involved after the jury had begun deliberating?

B. STATEMENT OF THE CASE

Emanuel Moore was charged with advancing and profiting from prostitution in the second degree and unlawful delivery of cocaine. CP 3-4. Mr. Moore was acquitted on the cocaine charge and convicted by a jury on the promoting prostitution charge. CP 85-86.

On January 29, 2015, David Crommes, an undercover officer sent a text message to 253-362-5529 to a person listed as "Fish" in a backpage.com advertisement for sexual services. RP 165-169. "Fish" is Micaela Fish. RP 180. The next day on January 30, 2015, Fish's backpage.com ad listed a different telephone

number: 253-468-8632. RP 178.

Without objection from the defense, the trial court admitted exhibit 42, a series of text messages from three different cell phones. RP 287-307. Exhibit 10 was the cell phone with the number 253-363-5529. Exhibit 11 was the cell phone with the number 253-332-4727. Exhibit 12 was the Kyocera cell phone with cell phone number 253-468-8632.

On January 29, Crommes met with Fish for a few minutes at the Western Inn. RP 170, 174. Officer Jeff Larson observed Moore drive into the Inn parking lot and park under room 240. RP 375. Fish and Moore met for a few minutes, after which Fish returned to room 240 and Moore returned to his parking spot. RP 372-377.

On January 30, Fish sent Crommes a text indicating that she had a new cell phone number: 253-332-4727. RP 184. Fish sent Crommes a message on this phone indicating that she would be available at 3:45 PM. RP 184. Later, Crommes received a text from Fish on the number ending 8632, asking if Crommes was close by. RP 185. Crommes received another message from this phone indicating that Crommes should proceed to her room. RP 189.

Crommes also received a text from the 4727 number indicating that Fish was ready. RP 357.

Several other officers working surveillance with Crommes, testified that they observed a soldier enter Fish's room 240 at the Western Inn before Crommes arrived. RP 278-79, 379. The soldier remained a short while before he left the room. RP 279. The soldier entered Fish's room at 1505 and left at 1520. RP 379. After the soldier left Moore briefly visited with Fish. RP 379. Later, while Crommes was in room 240 with Fish, Moore arrived in the parking lot where he was arrested. RP 384.

After Moore was arrested, he gave Larson a cell phone number Larson was not familiar with. RP 384-85. Moore admitted that he had visited Fish in her room. RP 385. Larson called the cell phone ending in 4727 and heard that phone ring in Moore's girlfriend's car, that he drove to the Inn. RP 86. Larson did not verify that the 4727 number was ringing because of his call rather than from another phone. RP 485. Exhibit 10, the 5529 cell phone was on the driver's seat of the car Moore drove, and exhibit 11, the cell phone ending 4727 was on the passenger seat of the same car. RP

394.

A necklace with the symbol "Bos$" was hanging from the rear view mirror of Moore's girlfriend's car. RP 395. Several months after Moore and Fish were arrested, while Moore remained in jail, Fish had a tattoo created on her stomach that inscribed: "Boss Lady". RP 248, 405. Moore did not learn of Fish's tattoo until trial and did not give Fish money for this tattoo. RP 423. Fish refers to Moore as "Bos$" his music name. RP 427.

The cell phone ending 4727 was a cell phone that Moore used and also loaned out to Fish and other friends and family. RP 227, 438, 445-49. Fish admitted that without Moore's knowledge, she set up her backpage.com ad and arranged dates using the 4727 cell phone, but later told Moore what she had done. RP 227-29. Later, when the phone began ringing from unknown people, Moore gave Fish the phone. RP 230. According to Fish, Moore hated Fish prostituting and did not assist her. RP 254-55, 271-72.

Moore did however rescue Fish from an abusive pimp and paid for a hotel room for a few nights where Fish could sleep and be safe. RP 225-227, 236. Fish decided to prostitute herself to

make money. RP 227. Fish gave Moore her earnings for safe keeping because she was afraid she might be robbed by a John. RP 234. Fish only gave Moore a little cash for gas money when he would come to her at her request when she felt afraid. RP 235. Moore did not arrange for Fish to become a prostitute and was unaware of the backpage.com ad. RP 421-422. After Moore learned that Fish was prostituting herself, he tried to convince Fish to stop prostituting. RP 234, 423-34.

Moore worked for a Hookah lounge and offered Fish work at the lounge where she used the 4727 cell phone. RP 417, 422. Moore did not know that Fish used the Western Inn room for prostitution. RP 424. Moore did not want Fish to be a prostitute and gave her an opportunity at the Hookah house. RP 424. Moore testified that he was never involved in promoting, advancing or profiting from prostitution. RP 427.

Joel Martini, a forensic examiner extracted the contents of the three cell phones involved in this case. Exhibits 10, 11,12. RP 287-307. Martini could not determine the registered owner of any of the phones. RP 314. The text messages from Exhibit 10 and 11

that were presented as Exhibits 41 and 42 by Martini, who did not disclose the contents with specificity other than to indicate that some of the messages were from Moore sent to Exhibit 12, the Kyocera cell phone in Fish's possession at the time of her arrest. RP 260, 309-10. Exhibit 31 was an extraction from Exhibit 12, number ending 8632. RP 312.

Exhibit 41 and 42 were admitted into evidence but not read to the jury. Rather they were presented on an overhead viewer and for the first time, the prosecutor read the specific texts and informed the jury that the moniker "Bos$" indicated Moore. RP 482-88. Richard Barnes examined the cell phones and determined that the Samsung Galaxy S4 was Exhibit 10, the 4727 cell phone and had an email associated with that phone:bossmanpain@gmail.com. RP 473-475. The other Samsung, Exhibit 11 with the 5529 number had an email associated, michaelaremishelle@gmail.com. RP 474-75.

This timely appeal follows. CP 113.

C. ARGUMENTS

1. THE TRIAL COURT ERRONEOUSLY ADMITTED CELL PHONE TEXT MESSAGES WITHOUT ADEQUATE FOUNDATION OR IDENTIFICATION

AS REQUIRED UNDER ER 901(a).

The text messages sent to and from the two cell phones at issue in this case, exhibits 10 and 11, were never proved to be in Mr. Moore's possession when the text transmissions occurred. A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Magers,* 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. *Magers,* 164 Wn.2d at 181. The purpose of authentication is to establish that "the thing" authenticated is what it purports to be. *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989).

Pursuant to ER 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), *review denied,* 179

Wn.2d 1010, 316 P.3d 494 (2014) (citing *State v. Danielson,* 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

ER 901(b) was amended to add a specific section illustrating some methods for authenticating e-mail:

> Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

State v. Young, 192 Wn. App. 850, 855, 369 P.3d 205 (2016).

Authentication is particularly important in connection with e-mails, instant messages, and other electronically stored evidence, since these items are increasingly important pieces of evidence in criminal cases, the sender and recipient may not even know each other and may find it hard to identify the sender and authenticate

the document. 34 A.L.R.6th 253 (2008) American Law Reports ALR 6th.

With electronic devices and the internet, third parties can use a sender's e-mail, other people can use the same cell phone, and electronic records can be tampered with, so authentication is a serious issue. Id. Cases from other states are instructive.

A person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because "cellular telephones are not always exclusively used by the person to whom the phone number is assigned." *Rodriguez v. State of Nevada*, 273 P.3d 845, 849, 218 Ne. Adv. Op. 14 (Nev. 2012) (citing *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super. Ct. 2011)). Additional evidence is necessary to corroborate the sender's identity, such as the content and context of the texts. Id.

In *Rodriquez*, 10 of 12 text messages sent to victim's boyfriend from victim's cellular telephone following sexual assault implied that the victim was not ok and the boyfriend who was

receiving the text from the victim's home should go to her house. *Rodriguez*, 273 P.3d at 847-48. Even though the texts were from the victim's phone, there was no evidence that the phone was in the defendant's possession. The Court held that the messages were not properly authenticated because State's evidence did not demonstrate that defendant was the author of text messages. *Rodriguez*, 273 P.3d at 850.

In a delivery of cocaine case, the fact that a cellular telephone was found in the same house as defendant and contained some text messages referring to or directed at a person with defendant's first name was insufficient to authenticate text messages as being sent to defendant, even though cocaine was found in same kitchen drawer as the cell phone. *People v. Watkins*, 2015 IL. App. 3d 120882, 25 N.E.3d 1189 (2015).

There were however no cellular telephone records to indicate that the telephone belonged to or had been used by defendant or anyone else at residence, there was no eyewitness testimony to indicate that telephone belonged to or had been used

by defendant, and there were no identifying marks on telephone itself or on telephone's display screen to indicate that it belonged to or had been used by defendant. *Watkins*, 25 N.E.3d at 1204-05. Illinois R. Evid. 901(a) mirrors ER 901(a). *Watkins*, 25 N.E.3d at 1203.[1]

In *People v. Givans*, 45 A.D.3d 1460, 845 N.Y.S.2d 665 (4th Dep't 2007), involving a prosecution for criminal possession of a controlled substance, conspiracy, and aggravated unlicensed operation of a motor vehicle, the court agreed with the defendant that the trial court erred in admitting a text message from a cellular telephone in evidence, because the prosecution failed to establish the authenticity or reliability of the text message, and failed to establish that the text message was ever read by the defendant or even retrieved by him. *Givans*, 45 A.D.3d at 1461-62.

In our state in *Bradford*, Division One found that the State introduced sufficient evidence to support a finding that text messages read to the jury and contained in an examination report

---

[1]IL ST. ER 901 **(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

had been authenticated and were what the State purported them to be, namely text messages written and sent to a stalking victim's friend by the defendant. *Bradford,* 175 Wn. App. at 928.

The evidence included testimony that: for a substantial period of time, Bradford telephoned the victim and appeared at her place of employment on a frequent basis; Bradford also regularly appeared outside of the victim's house; and the content of the text messages themselves indicated that Bradford was the individual who sent them. *Bradford,* 175 Wn. App. at 928-29.

Similarly, in *Young*, 192 Wn. App. at 855, this Court relied on *Bradford* to hold that the text messages were properly authenticated where the victim had personal knowledge that the sender of the text messages was Young and the victim testified that Young forced her to participate in a fraudulent check transaction. Some of the texts corroborate this testimony. *Young,* 192 Wn. App. at 855-57.

Here by contrast to both *Young* and *Bradford*, there was no corroborating testimony linking Moore to the texts in question and Fish testified that she set up her prostitution business without

Moore's knowledge, and had worked for a different pimp in the past. RP 227, 234,421-22. Under *Young* and *Bradford,* the State did not provide sufficient supporting evidence that Moore was the individual responsible for sending the text messages to Fish. Both Moore and Fish testified that Fish borrowed the 4727 cell phone and Moore often lent this phone out to friends and family. RP 227, 445-49.

The fact that there were text messages between the 4727 cell and the other two phones in this case does not establish that Moore sent the texts. There is nothing in the content of the messages from "Bos$" that would establish that he, as opposed to some other party, sent the texts. No one testified that Moore sent the texts and Fish did not testify that she ever received specific texts from Moore. The State's only evidence linking Moore to the cell phone was that he regularly but not exclusively used that phone. RP 429, 436, 451. The State was unable to identify the owner of the phone.

Under these facts, there was simply no evidence to establish that the text messages were actually what they purported to be.

Accordingly, the State failed to sufficiently authenticate the text messages, and the trial court erred by admitting them.

The State charged Moore with promoting prostitution in the second degree by "unlawfully, feloniously, and knowingly profit from or advance prostitution" CP 4-5. The court instructed the jury that a person commits the crime of promoting prostitution in the second degree "when he or she knowingly profits from or advances prostitution". CP 61-84 (JI 6). The court's definition of knowingly excluded knowledge "that the person know that the fact, circumstance or result defined by law as being unlawful or an element of the crime". CP 61-84 (JI 7).

Without the text messages, there was no factual support for this charge or conviction because there was no evidence to establish beyond a reasonable doubt that Moore knowingly advanced or profited from prostitution. Accordingly, the error in admitting the texts without proper authentication or identification was not harmless, and Moore's conviction must be reversed.

Error Prejudicial

This Court will reverse an error in admitting evidence where the error is prejudicial to the defendant. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). When the error is based on violation of an evidentiary rule rather than a constitutional mandate, the reviewing courts apply the test where evidentiary error is prejudicial when within reasonable probabilities, the trial's outcome would have differed had the error not occurred. *Thomas*, 150 Wn.2d at 871.

Here, Moore was prejudiced because without the texts, within reasonable probabilities, the trial's outcome would have differed had the error not occurred because there was insufficient evidence connecting Moore to the texts. Accordingly, this Court must reverse and remand for a new trial.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT PROMOTED PROSTITUTION.

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). To determine if the State

presented sufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015).

An appellant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it]." *Condon*, 182 Wn.2d at 314 (alteration in original) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

To prove promoting prostitution in the second degree, the State had to prove beyond a reasonable doubt that Moore: "knowingly: (a) Profits from prostitution; or (b) Advances prostitution. RCW 9A.88.080. The State must also prove that the defendant intended to commit a crime. *State v. Fedorov*, 181 Wn. App. 187, 197-98, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014).

Knowledge that a friend is prostituting herself, does not alone support an inference of advancing or profiting from or

advancing prostitution. When knowledge or intent is an element of a crime, it may be inferred only "'if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.' "*State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (internal quotations omitted). In *Vasquez,* the Court instructed that although intent is typically proved from circumstantial evidence, it may not be inferred from evidence that is "patently equivocal." Id.

In, *Vasquez*, the issue was whether the evidence was sufficient to show the intent to injure or defraud that is needed to prove forgery. *Vasquez,* 178 Wn.2d at 13. The court held that the defendant's possession of forged identification cards alone was not sufficient to prove the necessary intent, and noted that the defendant's ready admission to a security guard that the cards were forged refuted the intent that he intended to defraud the guard. *Vasquez*, 178 Wn.2d at 14-16.

Here, similarly, the fact that Moore sometimes used the cell phone ending 4727, and held money for Fish for safekeeping and paid for a hotel room for her when she was down and out was

"patently equivocal" and thus insufficient to establish that Moore advanced or profited from prostitution.

3. PROVIDING THE JURY WITH AN ADDITIONAL JURY INSTRUCTION AFTER THE JURY BEGAN DELIBERATING IS REVERSIBLE ERROR.

The trial court gave an unanimity instruction after the jury had deliberated for an afternoon and returned the next morning to continue deliberating. RP 518-525. CR 6.15(f)(2) prohibits a court from giving an unanimity instruction after the jury has begun deliberating. CR 6.15 (f)(2) provides;

> 2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to **suggest the need for agreement**, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(Emphasis added) Id. The purpose of an unanimity instruction is to inform the jury that it must unanimously **agree** on which act occurred in support of the crime. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); *Accord, State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015).

> The *Petrich* instruction was later incorporated into the Washington Pattern Jury Instructions.

> 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: …. The WPIC instruction reflects the single-count roots of *Petrich,* instructing the jury that it must find that "one particular act" was "proved beyond a reasonable doubt" and "must unanimously **agree** as to which act has been proved." 11 WPIC note at 110 (Emphasis added)

Carson, 184 Wn.2d at 217. The *Petrich* instruction given in this case after the jury began deliberating was an instruction informing the jury that it must agree. The language in CR 6.15(f)(2) is mandatory, accordingly, when the trial court violated this rule, Moore was prejudiced. The remedy is to remand for a new trial. *Thomas*, 150 Wn.2d at 871.

4. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO OBJECT TO CELL PHONE TEXTS THAT WERE NOT PROPERLY AUTHENTICATED UNDER ER 901(A) AND FOR FAILING TO OBJECT TO UNTIMELY JURY INSTRUCTIONS.

a. Cell Phone Texts.

Defense counsel failed to object to cell phone texts that could not be properly authenticated or identified. The standard of

review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Wash. Const. art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant

rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus not immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn.

App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

The failure to move to suppress the cell phone texts attempting to link Moore with Fish's prostitution in this case cannot be considered tactical because without the texts, the State could not prove its case against Moore. *State v. Hamilton*, 179 Wn. App. 870, 880, 320 P.3d 142 (2014). In *Hamilton*, this Court reversed for prejudicial ineffective assistance of counsel where counsel failed to move to suppress unlawfully obtained evidence based on an unlawful warrantless search. *Hamilton*, 179 Wn. App. at 880-81, 888. This Court held there was no possible legitimate trial tactic to fail to move to suppress the evidence because the trial court would have suppressed if presented with a motion. *Hamilton*, 179 Wn. App. at 880-81.

Here, as in *Hamilton*, there was no possible legitimate trial tactic to fail to move to suppress the texts. Had counsel made the motion, as in *Hamilton*, the court likely would have granted the motion because the State could not satisfy the foundational requirements under ER 901(a). Here the failure to move to

suppress the texts, prejudiced Moore and denied him his constitutional right to effective assistance of counsel. This Court should remand for a new trial.

b. Failure to Object to Untimely Jury Instructions.

Trial counsel's failure to object to the untimely offering of an unanimity instruction was deficient performance, prejudicial and cannot be considered tactical because giving the instruction after the jury began deliberating violated the mandatory provisions under CR 6.15(f)(2*). In re Personal Restraint of Yung-Chen,* 183 Wn.2d 91, 102, 351 P.3d 138 (2015); *State v. Estes*, 193 Wn. App. 479, 489, 372 P.3d 163 (2016).

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland". Hinton v. Alabama*, ___U.S.___, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014). In sum, failing to conduct research falls below an object standard of reasonableness where the matter is at the heart of the case. *Estes*, 193 Wn. App. at 489 (citing *State v. Kyllo*, 166 Wn.2d 856, 868, 215 P.3d 177

(2009)).

Here, had trial counsel researched the applicable law regarding the admissibility of the texts under ER 901 and prohibition in giving the unanimity instruction after jury deliberations began under CR 6.15, he would have realized that the State could not establish a foundation and could not have offered the untimely unanimity instruction. Counsel's failure to conduct research fell below an object standard of reasonableness because the texts where at the heart of the case, and the varied facts therein the basis for the State's concern with unanimity. *Estes*, 193 Wn. App. at 489.

Under *Estes*, Moore was prejudiced by counsel's deficient performance, requiring remand for a new trial.

D. CONCLUSION

Mr. Moore respectfully requests this Court reverse and remand for dismissal with prejudice for insufficient evidence. In the alternative, Mr. Moore request remand for a new trial based on denial of his due process right to a fair trial and to the effective assistance of counsel.

DATED this 25th day of August, 2016

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served Pierce County Prosecutor at pcpatcecf@co.pierce.wa.us and Emanuel Moore DOC#892774, Coyote Ridge Corrections Center, Post Office Box 769, Connell, WA 99326-0769, a true copy of the document to which this certificate is affixed, on August 25, 2016. Service was made electronically to the prosecutor and via U.S. Mail to Mr. Moore.

Signature

ELLNER LAW OFFICE

August 25, 2016 - 4:32 PM

Transmittal Letter

Document Uploaded: 1-488141-Appellant's Brief.pdf

Case Name: State v. Emanuel Moore
Court of Appeals Case Number: 48814-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us